NEW OSHA Guidance
Issued: OSHA
Recordkeeping for 2020 Final
Deadline Today

The Occupational Safety and Health Administration (OSHA) released new guidance on January 29, 2021 signaling a more proactive role in the COVID-19 pandemic response. OSHA leadership explained on a conference call shortly after the guidance was released that a primary difference between this guidance and prior guidance is the “tone.” Prior guidance from the agency made suggestions for employers to “consider” taking certain actions. This new guidance uses words like “employers are responsible for” and “employers should” take certain actions.

The President’s Executive Order, which prompted this new guidance, also directed OSHA to consider whether an emergency temporary standard on COVID safety should be issued, and if so, to issue that by March 15, 2021. There is little doubt that OSHA will issue this standard by March 15, 2021. The new guidance will likely form the basis for this standard, so employers would be wise to study the guidance and compare it to their current COVID-19 related policies to assure the elements of the OSHA plan guidance have been covered.

Something else that is new in this guidance is a list of 15 elements of an effective COVID-19 prevention plan, including the following notable element:

14. Making a COVID-19 vaccine or vaccination series available at no cost to all eligible employees. Provide information and training on the benefits and safety of vaccinations.

During the conference call that accompanied the guidance release, we asked OSHA leadership about this requirement and their plans to push the federal and state governments to prioritize vaccines for essential workers. Unfortunately, their response was that the vaccine rollout is outside of their jurisdiction.
This places employers in a difficult spot. Employers cannot provide vaccines at the present time, because they are not available. While the federal Centers for Disease Control recommends frontline essential workers to be next in line after health care and nursing homes, some states are not following those recommendations. In fact, states are commonly shifting vaccine priorities to individuals who are 65 or older, placing many of the 50 million people in that category in front of essential frontline workers. While it is certainly important to vaccinate everyone and the risk for older Americans is real, the vaccines are being paid for and supplied by the federal government and the federal government has cornered the market on the vaccine. If OSHA expects employers to make vaccines available, then the federal government needs to assure that the delivery of vaccines follows the schedule it created, which would place essential frontline workers in the front of the current line for vaccines.

For now, employers can focus on vaccine education to increase employee understanding of the importance of vaccines and determine the employer policy regarding vaccines. If top executive(s) of the company are over 65 years of age, consider showing images or video of them getting the vaccine to demonstrate to employees the ease, safety, and process.

Many employers are considering providing incentives to employees who get the vaccination, while others are considering mandatory vaccines. Employers should also monitor and document their efforts to secure vaccination opportunities for their employees, especially if they fit into the essential frontline worker groups. The CDC list of essential categories mapped to industry classification can be found here.

Preparing to Finalize and Post OSHA 300 Logs

February 1st is the deadline for finalizing and posting OSHA 300 injury and illness logs. This is an annual requirement, but this year it is particularly challenging because of the need to evaluate whether COVID-19 related cases are work related. Documenting decisions on COVID-19 reporting is extremely important. As mentioned above, on January 21, 2021, President Biden issued an executive order calling for increased protection of the safety and health of workers from COVID-19, and OSHA issued new guidance, which was released on Friday, January 29. The President's executive order also directed OSHA to increase enforcement and review past enforcement on COVID-19 safety. One of the first things OSHA asks for in an enforcement inspection is the OSHA 300 log.

On May 26, 2020, OSHA declared COVID-19 a recordable illness for all employers. Employers are responsible for recording workplace cases of COVID-19 on an OSHA 300 Log if the case: (1) is confirmed COVID-19, as defined by the Centers for Disease Control and Prevention (CDC); (2) is work-related, as defined by 29 CFR 1904.5; and (3) involves one or more of the general recording criteria set forth in 29 CFR 1904.7.

Given the difficulty with determining work-relatedness. OSHA has been instructing its inspectors that they should apply the following approach in assessing the employer’s compliance:

- The reasonableness of the employer’s investigation into work-relatedness.
- The evidence available to the employer.
- The evidence that a COVID-19 illness was contracted at work.

Employers should keep the following things in mind when finalizing OSHA 300 logs:
Exposures at the Workplace – Exposures include anyone who already tested positive or had symptoms in the days before the employee tested, at the same time the employee tested, or within the days after the employee tested. The CDC’s definition of exposure is being within six feet of someone who has COVID-19 for a total of fifteen minutes or more in a twenty-four hour time period, having direct physical contact with someone, or someone sneezing, coughing, or somehow getting respiratory droplets on you.

For any severe cases of COVID-19 causing hospitalization or death, it is important to document the decision not to record the case. Such decisions should document: outside of work exposures identified; contact tracing done within the workplace that showed the employee had no workplace exposure; statements from the employee; timing of symptom on-set in relation to employee work or time-off schedule; and information from medical providers, public health, or other sources.

Days Away from Work – You must count the number of calendar days the employee was unable to work as a result of injury or illness, regardless of whether the employee was scheduled to work on those day(s). So, if an employee was sick on Saturday and Sunday because of COVID-19 and was not able to work, even if the employee was not scheduled to work, these days still count as days away from work under 29 CFR 1904.7(b)(3).

For further information on COVID-19 safety, vaccination schedules, recordkeeping or other matters discussed in this alert, contact Charles B. Palmer, Denise Greathouse, Nadia Gonzalez, or your Michael Best attorney. Lastly, visit our COVID-19 Vaccine Planning Resources page to access articles and complimentary resources to help you navigate the continually evolving guidance and action plans related to COVID-19 vaccines. We will keep you informed on the latest updates from lawmakers, industry experts, and health agencies.

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